19-ORD-087

May 10, 2019

In re: Jessica Huseman/State Board of Elections

Summary: Kentucky State Board of Elections ("SBE") violated the Open Records Act by improperly delaying requester's access to public records. SBE violated KRS 61.874(2)(a) by failing to adhere to a request for electronic copies of the responsive records, and by requiring payment of a copying fee for receiving hard copies of records specifically requested in electronic format. SBE failed to meet its burden of proof under KRS 61.880(1) and KRS 61.880(2)(c) in denying 362 pages of responsive records. SBE violated the Act by applying numbering stamps and "watermarks" to copies of responsive records. SBE violated the Act by affording the Secretary of State's attorney greater access to public records than the public, without a statement of a legitimate governmental purpose for the request. SBE's claim of five exemptions under KRS 61.878(1) fails as a matter of law. SBE violated KRS 61.880(1) and KRS 61.878(4) when it issued a blanket denial of responsive records pursuant to the "personal privacy" exemption of KRS 61.878(1)(a). SBE subverted the intent of the Act, within the meaning of KRS 61.880(4), at the direction of the Secretary of State's office.

Open Records Decision

The issue presented in this appeal is whether the Kentucky State Board of Elections ("SBE") violated the Open Records Act ("Act") in the disposition of a request for records submitted by Jessica Huseman ("Appellant"), reporter for ProPublica. For the reasons stated below, we find that SBE violated the Act. We also find that SBE subverted the intent of the Act, within the meaning of KRS 61.880(4),[1] at the direction of the Secretary of State's office.

Background

On March 1, 2019, Appellant faxed an appeal to our office.[2] Appellant stated that the appeal was "related to a records request I placed with the [SBE] on Feb. 8, 2019." Appellant stated she requested documents the SBE had previously provided to Kent Wicker, a private attorney representing Secretary of State Alison Lundergan Grimes.[3] Appellant provided her email address and asked that SBE provide copies of the responsive records electronically.

Appellant attached to this appeal SBE's February 1, 2019 response to Mr. Wicker's request. She stated Mr. Wicker requested documents on December 3, 2018, and the SBE provided responsive records in two parts on January 17, 2019 and February 1, 2019. Acting Custodian of Records Sandy Milburn issued the response stating SBE had previously issued a partial response of "documents numbered 1 through 166[.]" She also stated, "[p]lease accept this as our final

[1] KRS 61.880(4) states, "[i]f a person feels the intent of KRS 61.870 to 61.884 is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees or the misdirection of the applicant, the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied."

[2] Our office assigned case number 201900084 to Appellant's March 1, 2019 appeal of SBE's failure to respond to her request for records. On March 21, 2109, Appellant appealed SBE's belated response to her request for records. Our office assigned case number 201900137 to that appeal. We consolidated the two appeals because they relate to the same open records request.

[3] The Secretary of State was chair of SBE at the time Appellant submitted her request for public records to the agency. On March 3, 2019, House Bill 114 (R.S. 2019) took effect with an emergency clause, making the Secretary an ex officio, non-presiding, non-voting member of SBE.

response, as we are enclosing…documents numbered 1 through 924." The response indicates SBE provided a total of 1,090 pages of records to Mr. Wicker. Ms. Milburn indicated that SBE was withholding an unspecified number of responsive records "pursuant to KRS 61.878(1)(i) and (j)" and "under KRS 61.878(1)(m)[.]" However, she did not state that any information was redacted from the responsive records. Ms. Milburn concluded: "[t]his response…constitutes final action of the [SBE]."

On February 13, 2019, Ms. Milburn replied to Appellant's request stating that SBE "is reviewing the files and will comply with your requests and anticipates all responsive non-exempt records being made available to you on or before Thursday, February 28, 2019." Ms. Milburn also stated that the total number of responsive pages would be "545 for a total charge of $54.50." On February 28, 2019, SBE issued a second response, which delayed Appellant's access an additional 30 days.

On March 1, 2019, Appellant appealed, stating, "[d]espite these documents being…collected, reviewed, and appropriately redacted or withheld, my request for the same documents has now been delayed twice so that SBE may review the same files and determine which are subject to release." Regarding SBE's statement that it would allow access to only 545 pages of responsive records, Appellant argued, "[i]t is unclear why they intend to release only half the records that have already been released."

On March 5, 2019, SBE requested additional time to respond to the appeal, asserting, "this agency has not denied ProPublica's request. We are reviewing the appeal and would appreciate a chance to fully and accurately respond." On March 6, 2019, this office extended the appeal pursuant to KRS 61.880(2)(b)1[4] due to "the need

[4] KRS 61.880(2)(b)1 states, in relevant part, "In unusual circumstances, the Attorney General may extend the twenty (20) day time limit by sending written notice to the complaining party and a copy to the denying agency…[.] As used in this section, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper resolution of an appeal: (1) The need to obtain additional documentation from the agency or a copy of the records involved[.]"

to obtain additional documentation from the public agency." As grounds for the extension, we requested that SBE provide "a copy of the responsive records, to serve as documentation and substantiation of the response provided to the Appellant." This request was made pursuant to KRS 61.880(2)(c)[5] and 40 KAR 1:030, Section 3.[6] We noted that Appellant, "expected the response to consist of 1,090 pages[.]"

On March 15, 2019, SBE disclosed 607 pages of responsive records to Appellant and this office. While this office cannot discuss the contents of records disclosed by a public agency, it can describe the physical character of the records without disclosing the contents. SBE stamped the lettered face of all 607 pages four times with the word "PROPUBLICA." Appellant and SBE describe the physical markings as "watermarks." SBE also stamped the top of each page two times with corresponding page numbers and number of pages.

SBE included a formal written appeal response with the responsive records. SBE argued that the appeal should be dismissed as premature. SBE argued that the delay in responding was reasonable, due to nine additional open records requests submitted by Appellant. SBE also argued that additional time was necessary due to strain caused by "the upcoming 2019 Primary Election" and "the current 2019 General Assembly session." Regarding responsive records it withheld, SBE stated, "agencies are not required to disclose exempt material, including attorney/client privileged documents." SBE

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[5] KRS 61.880(2)(c) states: "On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney General may also request a copy of the records involved but they shall not be disclosed."

[6] 40 KAR 1:030 Section 3 states: "Additional Documentation. KRS 61.846(2) and 61.880(2) authorizes the Attorney General to request additional documentation from the agency against which a complaint is made. If documents thus obtained are copies of documents claimed by the agency to be exempt from the Open Records Law, the Attorney General shall not disclose them and shall destroy the copies at the time the decision is rendered."

also argued that there was no merit to Appellant's claim that "she is entitled to access the exact same records as Secretary Grimes." SBE argued, "Secretary Grimes is the duly elected Secretary of State… [t]herefore, she has the right, under the Kentucky Constitution and state and federal law to access records of the Agency." SBE also asserted the following:

> Here, Mr. Wicker is Secretary Grimes' attorney—not a member of the public. Because Secretary Grimes has the right to access any and all records of the Agency— and has the right to share these with her chosen representatives— there has been no disclosure to the public and no waiver of any exemption has occurred. Any finding to the contrary would violate Secretary Grimes' constitutional right to due process and to counsel.

On March 21, 2109, Appellant appealed the SBE response.[7] Appellant argued that "Mr. Wicker should have no more access this information than any member of the public." Appellant stated that SBE had not cited specific authority that gave Secretary Grimes "complete access to the internal correspondences of SBE employees." Appellant argued, "[i]f Ms. Grimes had a right of such access, she would not have needed to have her attorney submit a public records request to access that information – she simply could have demanded it herself without the need for such formality."

Appellant also argued that SBE afforded Mr. Wicker more favorable treatment than the general public. In support, Appellant attached a copy of an email exchange between her and SBE staff regarding its decision to "watermark" the responsive records and asking whether records SBE provided to Mr. Wicker were similarly

[7] There was no error in Appellant's appeal of the denial of responsive records in SBE's belated response. In 96-ORD-193, this office recognized that there is no limitation on the number of requests and subsequent appeals that an applicant may submit. In addition, KRS 61.880(2) requires that this office, "review a public ageny's denial of a request to inspect a public record[.]" Accordingly, we reviewed Appellant's subsequent appeal raising issue with SBE's denials.

stamped. SBE Assistant Executive Director and General Counsel Jennifer Scutchfield responded by stating, "I have confirmed from speaking with Ms. Milburn that they were not watermarked and the response was sent by the Secretary of State's Office. She was out of town and did not even see the response before it was sent." This response led Appellant to argue that SBE violated the Act because its custodian of records, Ms. Milburn, did not issue the agency's response. Our office assigned the subsequent appeal case number 201900137.

On March 28, 2019, Ms. Scutchfield submitted SBE's formal response to appeal 201900137.[8] Ms. Scutchfield stated that SBE had responded to the contested open records requests at the direction of the Secretary of State's office. Ms. Scutchfield stated the following:

> Upon the direction of Assistant Secretary of State Erica Galyon, [SBE] was directed to have all open records requests approved by the Secretary of State's office. In the case of Kent Wicker's open records request and Jessica Huseman's open records requests, the responses were drafted under the supervision of Erica Galyon. Once drafted, they were presented to Sandy Milburn to sign and reply with the responsive documents, as assessed by the Secretary of State's office.
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> Of note, not until the response from the [SBE] to the initial appeal by Jessica Huseman, was it ever acknowledged that Kent Wicker was private counsel for the Secretary of State.
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> The determination of the records redacted and released to Jessica Huseman, and in the same vein, Kent Wicker, was entirely handled at the direction of the Secretary of State's office…Sandy Milburn was instructed by Erica Galyon to respond in the manner in which she did.

[8] SBE's response to 201900137 was directed to Assistant Attorney General Gordon Slone. Mr. Slone transferred the entire record for that appeal to the appeal file for 201900084. SBE's responses to 201900137 were then available for review for this decision.

Ms. Scutchfield argued that any penalty imposed for violations of the Act should be imposed upon the Secretary of State's office rather than SBE.

On March 28, 2019, this office requested unredacted copies of all responsive records withheld by SBE for the purpose of *in camera* review, pursuant to KRS 61.880(2)(c) and 40 KAR 1:030, Section 3, to determine "whether SBE justifiably relied on the [attorney-client privilege] exemption to withhold records." Our office also informed the parties that the appeals were consolidated. On April 12, 2109, SBE responded to our request by letter, enclosing a Privilege Log of records it withheld and identifying the exemption to disclosure it asserted applied to each withheld record. The privilege log listed 84 emails by title and party, but did not: describe the number of pages, describe the content of the emails, or identify the parties other than by name. SBE stated that "[s]uch confidential and privileged records are not subject to release pursuant to an Open Records Act appeal, especially in light of the ongoing investigation by the Attorney General against Secretary Grimes."

On April 22, 2019, the Attorney General clarified for SBE that the "Garrard County Attorney…is the appointed Independent Counsel conducting the investigation. This office has no role in the investigation." On April 25, 2019, Ms. Milburn and Assistant Secretary of State Erica N. Galyon produced 121 pages of records stating, "[e]nclosed for your confidential *in-camera* review are documents withheld from ProPublica's February 8, 2019 open records request." SBE provided no description of the 121 pages of responsive records or justification for their withholding, other than the privilege log. SBE did not address the 362-page discrepancy between the records produced in the course of this appeal, and those provided to Mr. Wicker.[9]

[9] SBE produced 607 pages of responsive records for Appellant. SBE produced 121 pages of withheld responsive records for the *in camera* review of the Attorney General. Therefore, SBE produced 728 pages of responsive records during the appeal. The record establishes that SBE disclosed 1090 pages of responsive records to Mr. Wicker. As of this date, SBE has not accounted for the 362-page discrepancy.

Although the office cannot discuss the contents of records SBE provided for *in camera* review, it can offer a description of the records without disclosing the contents. The records submitted for *in camera* review contained approximately 136 email messages, at least 52 more than are listed in the privilege log. SBE stamped the lettered side of the 121 pages three times with the phrase "OAG CONFIDENTIAL." SBE also stamped the top of each page once with a corresponding page number and number of pages.

The Appeal Is Not Premature. SBE argues that the appeal is premature because the agency had not yet responded to Appellant's request when she appealed. We do not agree. The Act imposes a duty on the Attorney General in KRS 61.880(2) "to review a public ageny's denial of a request to inspect a public record[.]" The record establishes that SBE's first response informed Appellant that the agency anticipated denying access to at least some of the 1090 pages of responsive records provided to Mr. Wicker. In addition, the claims Appellant raises regarding her delayed access to records; the fees imposed after disregarding her request for electronic copies; and SBE's disparate treatment of her request and that of Mr. Wicker relate to subversion of the intent of the Act. This office has decided that an appeal is not premature if it alleges conditions imposed on a request for records that subvert the intent of the Act. *See* 18-ORD-211. KRS 61.880(4) requires that the Attorney General consider an argument that a public agency subverted the intent of the Act. Accordingly, we decline to find that the appeal is premature.

SBE Violated the Act by Improperly Delaying Appellant's Access to Public Records. SBE violated the Act by failing to properly delay Appellant's access to the responsive records. The only provision that authorizes postponement of access beyond three working days, KSR 61.872(5), provides that if public records are "*in active use, in storage or not otherwise available*," the official custodian of the public agency "shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records not to exceed three (3) days from receipt of the application, *unless a detailed explanation of the cause is given for further delay* and the place, time,

and earliest date on which the public record will be available for inspection." (Emphasis added). If a response requires more than the mandatory three business days set forth in KRS 61.880(1),[10] the public agency is required to specifically invoke KRS 61.872(5). *See* 01-ORD-140, p. 3; 18-ORD-188. Accordingly, SBE violated the Act by failing to expressly invoke KRS 61.872(5) in its initial response or supplemental responses.

SBE also improperly delayed Appellant's access by failing to provide a detailed explanation of the cause for delay, as required by the Act as required under KRS 61.872(5). 01-ORD-38, p. 5 (Emphasis added); 14-ORD-226, p. 4. Only if the parameters of a request are broad, and the records implicated contain a mixture of exempt and nonexempt information, and are difficult to locate and retrieve, will a determination of what is a "reasonable time for inspection turn on the particular facts presented." 01-ORD-140 p. 4 (quoting OAG 92-117, p. 4).

SBE argues that the burden of responding to Appellant's nine other open records requests caused delay. However, the burden of addressing Appellant's other requests is not a "detailed explanation of the cause" for delay because it "sets forth neither the volume of records involved nor explains, in detail, the problems associated with retrieving the records implicated by the request that would support a [thirty day] delay in providing the requested records." 02-ORD-217. SBE does not argue that the nine requests posed an "unreasonable burden in producing public records" or that the requests "are intended to disrupt other essential functions of the public agency" within the meaning of KRS 61.872(6).[11] The record lacks clear and convincing

[10] KRS 61.880(1) states in pertinent part: "Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision."

[11] KRS 61.872(6) states: "If the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copes

evidence to support such a claim. *See* KRS 61.872(6). Nevertheless, the burden of responding to Appellant's other requests does not constitute a "detailed explanation of the cause" for delay, for purposes of KRS 61.872(5).

Citing a prior decision of this office, SBE argues that persons making broad requests for large volumes of email or other records "cannot reasonably expect agencies…to produce all responsive records within the three day deadline" imposed by KRS 61.880(1), and "[a]pplicants are therefore urged to frame their requests as narrowly as possible and, if unable or unwilling to do so, to expect reasonable delays in records production." 17-ORD-128, p. 4 (quoting 12-ORD-228 (deciding that the need to review 249,504 e-mails justified six-month delay in providing access)). However, SBE has not fully divulged the volume of responsive records at issue. The record also establishes that Appellant's request sought a copy of responsive records SBE had provided to Mr. Wicker in the prior week. The public agency has the burden of proof in these appeals, pursuant to KRS 61.880(2)(c). Accordingly, we cannot assume that the number of records at issue is unreasonably high. SBE fails to associate the volume of records implicated by Appellant's requests with any difficulty in retrieving the records.

SBE also argues that the public agency's duties during the 2019 primary elections and the 2019 General Assembly caused the delay. However, explanations related to the ancillary duties of staff also fail to set forth the volume of records involved or explain, in detail, the problems associated with retrieving the records. *See* 02-ORD-217; 09-ORD-091 (statutory period for agency response "cannot be extended to accommodate the schedules of agency staff"). Therefore, we find that SBE violated KRS 61.872(5) in failing to provide a "detailed explanation of the cause" for delaying Appellant's access to public records.

SBE Violated KRS 61.874(2)(a). SBE violated KRS 61.874(2)(a) by failing to adhere to Appellant's request for electronic copies of

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thereof. However, refusal under this section shall be sustained by clear and convincing evidence."

responsive records. SBE further violated the Act by requiring Appellant to pay the cost in advance of receiving hard copies of responsive records when those records were available in electronic format. KRS 61.874(2)(a) provides:

> Nonexempt public records used for noncommercial purposes shall be available for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the agency currently maintains the records in electronic format. Nonexempt public records used for noncommercial purposes shall be copied in standard hard copy format where agencies currently maintain records in hard copy format. Agencies are not required to convert hard copy format records to electronic formats.

(Emphasis added). In construing this provision, the Attorney General has repeatedly determined that "if nonexempt records exist in both standard electronic and standard hard copy format, the public agency must permit inspection of and copying in the format requested by the requester." 99-ORD-12, p. 6. Unless the requested records exist only in hard copy format, discretion rests with the requester, and not the agency, to determine whether copies are to be provided in electronic or hard copy format.

Appellant specifically requested copies of the public records in electronic format and provided an email address for electronic receipt of the records. SBE presents no evidence that it was unable to honor Appellant's request. Further, the record does not contain any evidence that the requested records exist only in hard copy format. SBE violated the Act by failing to adhere to Appellant's request. SBE further violated the Act when it required Appellant to pay a copying fee for the paper copies requested in electronic format. *See* 14-ORD-148 (agency "cannot impose a ten cents per page copying fee for paper copies of electronic records requested in electronic format.")

SBE Failed to Meet Its Burden of Proof in Withholding 362 Pages of Responsive Records. SBE denied Appellant access to responsive records, initially claiming an exemption under the attorney-client privilege, codified under KRE 503 and operating in tandem with KRS 61.878(1)(l).[12] SBE disclosed withheld responsive records pursuant to this office's request. However, SBE failed to disclose – without any explanation – 362 pages of responsive records from its disclosure to this office. SBE has offered no evidence to support the claim of attorney-client privilege, other than asserting the purported constitutional authority of the Secretary of State to access SBE public records at will. As such, we find that SBE failed to satisfy its burden of proof in failing to justify withholding the missing 362 pages of responsive records.

KRS 61.880(1) provides that a "response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." In *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996), the Court of Appeals found that KRS 61.880(1) requires the agency "to provide particular and detailed information in response to a request for documents," admonishing the public agency for its "limited and perfunctory response." The Kentucky Supreme Court has observed that, "[w]hereas in most disputes both sides have more-or-less equal access to the relevant facts, so that factual assertions and legal claims can be adversarially tested, in ORA cases only the agency knows what is in its records." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). The court suggested that a public agency "should provide the requesting party and the court with sufficient information about the nature of the withheld record…to permit the requester to dispute the claim and the court to assess it." *Id*. at 852; 14-ORD-108; 17-ORD-177.

[12] KRS 61.878(1)(l) excludes: "Public record or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly."

A public agency has the statutory burden of justifying its denial of an open records request. *See* KRS 61.880(2)(c). In addition, SBE "bears the burden to rebut the strong presumption in favor of disclosure." *Commonwealth v. Chestnut,* 250 S.W.3d 655, 660 (Ky. 2008). In light of KRS 61.871, declaring that "free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed," and KRS 61.880(2)(c), the Attorney General is "not prepared to accept, without independent confirmation, that all of the responsive documents are shielded from public inspection by KRS 61.878(1)(h), (i), (j), or any other exception[.]" 10-ORD-079, p. 6 (citation omitted); 17-ORD-221. This includes records an agency claims are exempt under the attorney-client privilege. *See* 16-ORD-133.

The Kentucky Court of Appeals has recognized that "the protections generally afforded by the attorney-client privilege have been recognized and incorporated into the [Open Records Act] by the Kentucky General Assembly." *Hahn v. Univ. of Louisville*, 80 S.W.3d 771, 774 (Ky. App. 2001). However, the attorney-client privilege, codified under KRE 503 and operating in tandem with KRS 61.878(1)(l), is not absolute. The privilege only attaches to a confidential communication "made to facilitate the client in his/her legal dilemma and made between two of the four parties listed in [KRE 503]; the client, the client's representative, the lawyer, or the lawyer's representatives." *The St. Luke Hospitals, Inc. v. Kopowski*, 160 S.W.3d 771, 776 (Ky. 2005)(quoting *Haney v. Yates*, 40 S.W.3d 352, 355 (Ky.2001)).

In the first appeal response, SBE asserted that the 362 pages of records it withheld from our office are protected by attorney-client privilege. However, SBE offered no description of the content of the records, it has not identified the parties to the communications, and this office has had no opportunity to review the records. Further, the privilege log shows Secretary Grimes was named in two of the emails, neither of which name Mr. Wicker. Mr. Wicker's name does not appear in the emails in the privilege log, and there is no evidence in the record of an attorney-client relationship between Mr. Wicker and SBE.

As such, there is no evidence to establish all of the necessary elements for invocation of the attorney-client privilege for the 362 pages of records withheld.

SBE later provided a privilege log to justify the denial of records, but there is no evidence any of the exemptions claimed in the document would apply to the missing 362 pages. The log provides no description of the content of the emails beyond the title in the subject line. In addition, our *in camera* review of the 728 pages of responsive records SBE produced shows that the privilege log did not account for as many as 52 email messages. Therefore, there is no evidence that any of the 362 pages of missing withheld records are identified in the privilege log. When a public agency declines to produce records that are purportedly exempt from disclosure for *in camera* inspection, the Attorney General's office has repeatedly found that "the agencies whose denials were challenged had not met their burden of proof in sustaining those denials under KRS 61.880(2)(c)." 10-ORD-079. *See* 05-ORD-169 (Attorney General's ability to render a decision is "severely impaired" without exercising his authority under KRS 61.880(2)(c) and 40 KAR 1:030 Section 3); 95-ORD-61; 96-ORD-206; 04-ORD-031; 05-ORD-185; 16-ORD-113; 16-ORD-133; 16-ORD-193; 17-ORD-011; 17-ORD-014. Accordingly, we find that SBE failed to justify withholding 362 pages of responsive records.

SBE Violated the Act by Altering Responsive Records. We find that SBE violated the Act when it provided Appellant copies of responsive records altered with page numbering stamps and "watermarks." The Act creates a public the right to inspect public records and the right to receive copies of public records. KRS 61.872(2); KRS 61.874(1).[13] KRS 61.874(1) states, "the custodian of the records shall duplicate the records or permit the applicant to duplicate the records[.]" Therefore, the Act gives the public the right

[13] KRS 61.872(2) states: "Any person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected. The application shall be hand delivered, mailed, or sent via facsimile to the public agency."

to obtain duplicate copies of public records in the possession of a public agency, or to receive duplicate copies by mail. *See* KRS 61.872(3)(b).[14]

The Act's only exception to this right is a public agency's duty to redact excepted material or information. As KRS 61.878(4) states, "If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination." In discharging this duty to redact, public agencies often create a duplicate of the original record, make appropriate redactions, and disclose the redacted record. 14-ORD-229, p. 4. The agency satisfies its duty under KRS 61.872(2), and KRS 61.872(3)(b), as well as KRS 61.878(4), by affording the requester access to the redacted copy of the original record. *Id*. The Act does not otherwise permit a public agency to redact, alter, or mark copies of responsive public records.

The evidence in the record also demonstrates that individual requesters suffer disparate treatment under the application of SBE's policy of altering or marking copies of responsive records. Under SBE's current practice, those inspecting public records have access to unaltered originals. However, individuals requesting copies of the same public records receive copies SBE has altered. Therefore, the policy would operate to discourage those seeking copies due to the disparate access to unaltered original versions of the responsive records. In addition, the record shows that SBE arbitrarily determines how the responsive records are altered or marked among individual requesters. No evidence in the record exists showing that SBE altered, marked, or stamped the responsive records that Mr. Wicker received. However, SBE altered copies received by Appellant and the Attorney

[14] KRS 61.872(3)(b) states: "A person may inspect the public records: By receiving copies of the public records from the public agency through the mail. The public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located after he precisely describes the public records which are readily available within the public agency. If the person requesting the public records requests that copies of the records be mailed, the official custodian shall mail the copies upon receipt of all fees and the cost of mailing."

General, and altered Appellant's copies to a greater degree. SBE violated Appellant's right to receive duplicate copies of the agency's public records by altering the copies through number stamps and "watermarks." Accordingly, we find that SBE violated the Act by altering the responsive records in a manner beyond the limitations of KRS 61.878(4).

SBE Violated the Act by Affording Mr. Wicker Greater Access to Public Records. We also find SBE violated the Act in affording the Secretary of State's private attorney greater access to public records than the general public, without first receiving a statement of a legitimate governmental purpose for his request. In 96-ORD-110, this office was asked to determine whether a local school board member was required to proceed under the Open Records Act in order to access board records. We determined that the existence of a legitimate governmental purpose is instrumental to the degree of access a public official enjoys to an agency's public records. We observed:

> The Attorney General has consistently recognized that under the Open Records Law, all persons have the same standing to inspect public records and that the purpose for which an individual requests those records is irrelevant. 92-ORD-1136; OAG 89-86; OAG 91-129. "If one person [in the absence of a court order] is allowed to inspect a record, all should be allowed to inspect." OAG 89-86, at p. 5.
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> With reference to a city councilperson, in OAG 91-129, this office stated:
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> > Where, however, a public official, [such as a councilperson], representing a public agency, [such as a city council], makes a request for public records in the performance of a legitimate public function, KRS 61.878(5) [encourages] disclosure regardless of

whether an exemption might be invoked. That statute provides:

> [The exceptions to the Open Records Law] shall in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate govern-mental need or is necessary in the performance of a legitimate government function.

This provision has been interpreted to mean that even if records are exempt from the public generally, they should be made available to public agencies, and by extension, public officials, for legitimate governmental purposes. [Citations omitted.]

Note, however, in OAG 92-141, involving a request by members of the school board to review the personnel records, including performance evaluations, of certified and classified employees, this office stated:

> While the Open Records Act [suggests], at KRS 61.878(5), that the exceptions to public inspection should not prohibit or limit the exchange of public records or the sharing of information between public agencies, this exchange is conditioned upon the agency with which information is shared serving a legitimate governmental need or performing a legitimate government function. Since the board of education no longer plays any role in personnel actions, it does not enjoy any greater right of access to the files by virtue of this provision. The board's right to inspect the personnel files of certified and classified

> > employees of the school system is therefore the same as the right of inspection enjoyed by any citizen under the Open Records Act. A member of the board must submit a written request to the custodian of the files in which he specifically describes the records he wishes to inspect. The custodian may deny the board member's request if the record he asks to inspect falls within the parameters of one or more of the exceptions codified at KRS 61.878(1)(a)--(k) [now recodified as KRS 61.878(1)(a) - (p)].
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> Thus, ...a member of the school board would be entitled to documents of the school system which relate to a legitimate governmental purpose and the board member's public function. If the request is for records which fall outside this area, then the board member's right of inspection would be the same as that of any other citizen under the Open Records Act.

96-ORD-110, pp. 4-5.

Following this precedent, Mr. Wicker and the Secretary of State were required to provide a statement of a legitimate governmental purpose to receive greater access to public records than the general public. The record contains no such statement from either individual. Thus, Mr. Wicker and the Secretary of State enjoy no greater right of access to public records than any other citizen of the Commonwealth.

SBE argues that the Secretary of State, as a duly elected constitutional officer, enjoys an independent right of access to SBE's records. However, the record establishes that Mr. Wicker accessed SBE's public records through the Open Records Act. The record also shows that SBE reviewed the responsive records for information exempt under KRS 61.878 and other provisions of law. SBE also stated that the response was a final agency action, as required by the Act.

Further, SBE stated in its response to appeal 201900137 that the agency was unaware that Mr. Wicker is Secretary Grimes' personal attorney before Appellant raised the matter on appeal. Accordingly, the requirements of the Act apply.

The evidence in the record shows that SBE afforded Mr. Wicker's request preferential treatment. Mr. Wicker received more records than Appellant in response to the same request. He received responsive records that were free of date stamps and "watermarks." Nothing in the record reflects that SBE assessed the copying costs to Mr. Wicker as it did to Appellant. However, the record reveals that SBE applied a greater degree of scrutiny for exemptions to Appellant's request than it did to Mr. Wicker's. The Attorney General has long recognized that persons have the same standing to inspect public records under the Open Records Act. OAG 79-546; OAG 80-641; OAG 89-86; OAG 91-129; 92-ORD-1136; 96-ORD-110; 01-ORD-8. SBE has provided no basis for departing from this precedent. Accordingly, SBE violated the Act in affording the Secretary of State's private attorney greater access to public records than the general public, without first receiving a statement of a legitimate governmental purpose for his request.

SBE's Claim of Five Exemptions Fail as a Matter of Law. SBE claims six KRS 61.878(1) exemptions apply to the 121 pages of responsive records disclosed for *in camera* review. However, SBE did not meet its burden of proof regarding five of those claimed exemptions and those claims fail.

SBE withheld records as "preliminary," pursuant to KRS 61.878(1)(i) and (j).[15] The Attorney General has long recognized that public records that are preliminary in nature forfeit that preliminary status upon being adopted by the agency as a basis for its final action. 05-ORD-177; 18-ORD-198. SBE forfeited the preliminary status of

[15] KRS 61.878(1)(i) and (j) create exceptions to the Open Records Act in cases of, respectively: "(i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;" [and] "(j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]"

these responsive records when it released them to Mr. Wicker. The record shows that SBE released these "preliminary" records in response to Mr. Wicker's request, and that SBE's response states that its release was a final agency action. There is no evidence in the record that SBE redacted any of these records, per KRS 61.878(4). Also, there is no evidence that SBE released any of these records to Mr. Wicker. As such, the records SBE released to Mr. Wicker were adopted as part of a final agency action, forfeiting any preliminary status.

SBE argued that some of the withheld records are exempt under what it describes as, "KRS 61.878 (m) (k)." We presume SBE intended to invoke KRS 61.878(1)(m), popularly known as the "homeland security" exception, incorporated into the Act by operation of KRS 61.878(1)(k).[16] However, SBE did not meet its burden of proof with respect to those records. This office has recognized that "[s]uccessfully invoking…the 'homeland security' exception, requires a public agency to meet a heavy burden." *See, e.g.,* 09-ORD-100; 05-ORD-175; 09-ORD-124, p. 5. By its own terms, KRS 61.878(1)(m) is "limited to" the types of records listed in subparagraphs KRS 61.878(1)(m)(1)(a) through (1)(h). Therefore, this office has found that an agency does not sustain its burden of proof related to the exception if it does not specify which subparagraph applies to the records. The agency must also demonstrate how disclosure would create a "reasonable likelihood of threatening public safety by exposing a vulnerability." 15-ORD-041; 17-ORD-272. SBE did not specify which of the subparagraphs applies to the withheld records. And nothing in the privilege log demonstrates a "reasonable likelihood of threatening public safety." Therefore, SBE did not sustain its burden.

SBE also asserts the attorney-client privilege as an exception authorizing its denial of a number of withheld emails. The emails at issue are communications between SBE General Counsel Scutchfield and staff of SBE, and were "made to facilitate the client in his/her legal dilemma." *See Kopowski*, 160 S.W.3d at 776; KRE 503(b). However,

[16] KRS 61.878(1)(k) excludes: "All public records or information the disclosure of which is prohibited by federal law or regulation[.]"

the record shows that the communications were disclosed to a non-client third party: Mr. Wicker. Thus, SBE waived the attorney-client privilege. *See* 16-ORD-113 ("The attorney-client privilege is generally waived if communications are made in the presence of a third party"); KRE 509.[17] SBE's response to appeal 201900137 indicates that, at the time of the disclosure, SBE was not aware that Mr. Wicker was the Secretary of State's personal attorney. Also, there is no evidence in the record that Mr. Wicker has an attorney-client relationship with SBE. Therefore, disclosure of the emails to Mr. Wicker was disclosure a non-client third party, which dissolved the privileged status of the communications. No evidence in the record preserves the privileged status of the emails. Accordingly, we find that SBE did not meet its burden of proof regarding the existence of an attorney-client privilege.

SBE withheld email messages pursuant to "[l]aw enforcement agencies action/administrative adjudication KRS 61.878 (h)." We presume SBE intended to invoke KRS 61.878(1)(h), which states as follows:

> Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of KRS 61.870 to 61.884, public records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action ... The exemptions provided by this subsection shall not be used by the custodian of the

[17] KRE 509 states, in relevant part: "A person upon whom these rules confer a privilege against disclosure waives the privilege if he or she or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privilege matter."

> records to delay or impede the exercise of rights granted by KRS 61.870 to 61.884[.]

In construing KRS 61.878(1)(h), the Attorney General has observed that, "[i]n order to successfully raise this exception, a public agency must satisfy a three-part test." 95-ORD-95, p. 1. First, the agency must establish that it is a law enforcement agency or a public agency involved in administrative adjudication. *Id*. Next, it must establish that the requested records were compiled in the process of detecting and investigating statutory or regulatory violations. *Id*. Finally, it must demonstrate that disclosure of the information would harm it by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action. *Id*., pp. 1-2. KRS 61.878(1)(h) specifically provides that the exception "shall not be used by the custodian of records to delay or impede the exercise of rights granted by KRS 61.870 to 61.884. The inclusion of this language imports a legislative resolve that the exception be invoked judiciously, and only when each of the tests has been met." 95-ORD-95, pp. 2-3.

In *City of Fort Thomas*, 406 S.W.3d at 851, the Kentucky Supreme Court held that the "the law enforcement exemption is appropriately invoked only when the agency can articulate a factual basis for applying it, only, that is, when because of the record's content, its release poses a concrete risk of harm to the agency in the prospective action." A concrete risk of harm, "by definition, must be something more than a hypothetical or speculative concern." *Id*. The court stated that a public agency should provide the requester and the court "sufficient information about the nature of the withheld record and the harm that would result from its release to permit the requester to dispute the claim and the court to assess it." *Id*.; 18-ORD-177.

Here, SBE did not provide any statements or evidence that premature release of the records would cause harm. No evidence suggests any potential harm in the contents of or conversations in the email messages. Also, no statement or evidence of potential harm

exists in the privilege log. As such, SBE failed to support denying Appellant's request pursuant to KRS 61.878(1)(h).

SBE Violated KRS 61.880(1) and KRS 61.878(4) by Issuing a Blanket Denial of Records Containing Personal Identifying Information. SBE withheld numerous records pursuant to the "personal privacy" exemption, stated in KRS 61.878(1)(a).[18] The exception authorizes withholding "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." 18-ORD-099. Our *in camera* review shows that some of the responsive records contain personal identifying information of private citizens. However, SBE withheld the responsive records in their entirety, rather than redacting the personally identifying information and releasing the nonexempt portion, as required by KRS 61.878(4). SBE also failed to provide Appellant a statement of the exception authorizing withholding those records, and it failed to state how the exception applied.

KRS 61.880(1) requires that if a public agency denies all or a portion of a requested record, it must "include a statement of the specific exception authorizing withholding of the record," and briefly explain how the exception applies to the record withheld. 07-ORD-018. The provision also requires a public agency to describe, at least in general terms, the nature of information redacted from a responsive record and state the specific exemption that authorizes the redaction. *Id*. The Kentucky Supreme Court allowed redaction of the private information of citizens, recognizing that "private citizens retain a more than de minimus interest in the confidentiality of the personally identifiable information collected from them by the state." *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 85 (Ky. 2013). However, the court rejected the practice of "*blanket* denials of ORA requests, i.e., the nondisclosure of an entire record or file on the grounds that some part of the record or file is exempt…" *Id*., at 88. (original emphasis).

[18] KRS 61.878(1)(a) excludes: "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]"

This office has affirmed the "categorical redaction" of identifying information of private individuals pursuant to *Kentucky New Era, Inc*. 15-ORD-093 (telephone numbers and home addresses of private individuals "have no manifest bearing on how LMPD performed its duties, and therefore this information was properly subject to categorical redaction"); 16-ORD-188 (personal information such as telephone numbers, birth dates, and home addresses of private individuals "have no manifest bearing" on how the University of Louisville performed its public duties). Therefore, a public agency may properly redact the personally identifying information of private citizens, if done in a manner consistent with the requirements of KRS 61.880(1) and KRS 61.878(4). However, SBE's blanket denial of records containing personal identifying information violated the Act.

SBE Subverted the Intent of the Act. We find that SBE subverted the intent of the Act within the meaning of KRS 61.880(4). The record establishes that SBE violated a number of procedural requirements of the Act. SBE also delayed Appellant's access to public records for greater than 30 days, without providing a sufficiently detailed explanation of the cause for delay. The record also establishes that SBE committed numerous substantive violations of the Act. In light of the evidence that the responsive records had already been gathered, reviewed, and issued the week prior to the request, these violations support finding that SBE subverted the intent of the Act.

Appellant argued that SBE's custodian of records did not issue the responses to her requests, and the responses were in fact issued by the Secretary of State's office. In response to 201900137, SBE argued that it responded as directed by the Secretary of State's office. The Act states, "[t]he response shall be issued by the official custodian or *under his* [or her] *authority*[.]" *See* KRS 61.880(1)(emphasis added). The record shows that Ms. Milburn reviewed responses prior to their releases. Therefore, SBE issued responses under the authority of the custodian of records. However, the evidence also shows that the Secretary of State's office directed SBE's responses to Appellant's request for records. The evidence further shows that the Secretary of

State's office directed SBE's response to this appeal and the Attorney General's requests for *in camera* review. The record shows that orders and instructions from the Secretary of State caused SBE to take actions that subverted the Act. We consider this evidence along with the facts in the record showing that the Secretary of State's office used its supervisory position over SBE to gain more favorable access to the agency's public records than the public. As such, we find SBE subverted the intent of the Act, within the meaning of KRS 61.880(4), at the direction of the Secretary of State's office.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceeding.

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